No. 81-21

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACK P. MICKLE AS MAYOR OF THE CITY OF COLUMBUS, A. J. McCLUNG AS MAYOR PRO TEM OF THE CITY OF COLUMBUS, HENRY N. BARBIAN, JACK B. BASSETT, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK LAND, ALAN G. NICAS, LEWIS POWELL, AND ROBERT L. WRIGHT AS COUNCILMEN OF THE CITY OF COLUMBUS, AND THE CITY COUNCIL OF COLUMBUS, GEORGIA,

Petitioners,

versus

CROSS COUNTRY CORPORATION d/b/a CROSS COUNTRY PLAZA SHOPPING CENTER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Georgia

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PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Seventh Amendment to the Constitution of the United States providing for a trial by jury in civil cases in suits at common law wherein the amount in controversy exceeds $20.00 extend to the States by virtue of Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting any State from depriving any person of life, liberty, or property without due process of law and prohibiting any State from abridging the privileges or immunities of citizens of the United States and prohibiting any State from denying any person within its jurisdiction the equal protection of the laws? Yes—despite contrary precedent which is similar to the old precedent in criminal cases.

2. Should the Supreme Court require state trials by jury in civil cases under the Seventh Amendment just as it has required state trials by jury in criminal cases under the Sixth Amendment? Yes—the new rule in criminal cases now suggests that the old rule in civil cases has been superseded.

3. Has the Supreme Court of Georgia, in rendering a decision under the authority of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, spoken contrary to decisions of the Supreme Court of the United States in *Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926) and subsequent cases? Yes—and the sole authority for the

Georgia Supreme Court decision is federal, since Plaintiff's invoking of the taking clause of the Georgia Constitution only refers to the consequences of the alleged denial of federal due process and is merely incidental thereto and Plaintiff's invoking of a provision of the Georgia Constitution protecting religious opinions and liberty of conscience is preposterous and has no evidence to support it: neither one of these Georgia constitutional provisions constitutes an adequate and independent state ground for the decision which this Petition seeks to set aside.

4. Has the Supreme Court of Georgia, in perfunctorily setting aside a legislative enactment of Columbus, Georgia under the federal due process clause, in effect denied the governing authority and the people of Columbus, Georgia and particularly those property owners adjacent to or in proximity to the tract of land out of which this case arises federal due process in violation of the Fifth and Fourteenth Amendments of the United States Constitution? Yes—by invalidating a City ordinance in what amounts to an ex parte grant of Plaintiff's motion in a proceeding that denies the City an adequate hearing and the right to confront and cross-examine witnesses.

LIST OF PARTIES

The caption contains all of the parties to the proceedings in the Georgia Supreme Court.

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1 Anderson, American Law of Zoning, §2.22 (1968) 7

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The decision of the Muscogee Superior Court is unreported, and the decision of the Georgia Supreme Court has not yet been published but should appear in volume 247 of the Georgia Reports.

JURISDICTION

The Supreme Court of Georgia on April 8, 1981 affirmed without opinion a decision of the Muscogee County Superior Court rendered April 9, 1980 invalidating a March 19, 1980 ordinance rezoning certain property of Cross Country Plaza Shopping Center from a residential classification (under which it had always been classified) to a commercial classification (together with certain restrictions to reduce the impact on adjacent residential property which were the same restrictions which Cross Country agreed to in a 1976 zoning petition the denial of which led to the present litigation). The Columbus Council's action of March 19, 1980 was in response to a previous summary judgment by the Muscogee Superior Court rendered February 26, 1979 requiring rezoning from a residential to a commercial classification or some other suitable constitutional classification, an order affirmed without opinion by the Georgia Supreme Court on January 8, 1980 (245 Ga. 68). Rehearing in the present phase of this case was denied May 5, 1981, and a stay of the remittitur pending filing of this Certiorari Petition was granted on May 12, 1981. Copies of all of these

documents plus Cross Country's April 3, 1980 motion to the Muscogee Superior Court invoking various constitutional provisions plus the City's response thereto as well as the City's March 10, 1978 request for trial by jury are contained in the Appendix.

The statutory provisions believed to confer jurisdiction on this Court to review the Judgment by Writ of Certiorari is 28 U.S.C. §1257(3) because the validity of a municipal ordinance (which qualifies as a "state statute" for the purpose of invoking this Court's jurisdiction: *John King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100 (1928)) is drawn into question on the ground that it is repugnant to the United States Constitution (the Due Process Clause of the Fourteenth Amendment) and further because the governing authority of Columbus, Georgia claims on behalf of itself and the people of Columbus, Georgia a right to a trial by jury under the Seventh and Fourteenth Amendments of the United States Constitution and a denial of due process of law under the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution.

Two reasons appear in Rule 17(c) of this Court for allowing this writ: the Georgia Supreme Court has decided an important question of federal law which has not been but which should be settled by this Court and has decided a federal question in conflict with applicable decisions of this Court. The Georgia

Supreme Court also has departed from the norms existing in other state courts of last resort and federal courts of appeals, and this court should issue a Writ of Certiorari in light of Rule 17(b).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES

1. Fifth Amendment, United States Constitution, see Appendix L, p. 42a for verbatim text.

2. Sixth Amendment, United States Constitution, see Appendix L, pp. 42a-43a for verbatim text.

3. Seventh Amendment, United States Constitution, see Appendix L, p. 43a for verbatim text.

4. Fourteenth Amendment, Section 1, United States Constitution, see Appendix L, p. 43a for verbatim text.

5. 28 U.S.C. §1257, see Appendix L, p. 44a for verbatim text.

6. Article I, Section I, Paragraph III of Constitution of Georgia of 1976 (Ga. Code Ann. §2-103), see Appendix L, pp. 44a-45a for verbatim text.

7. Article I, Section III, Paragraph I of Constitution of Georgia of 1976 (Ga. Code Ann. §2-301), see Appendix L, pp. 45a-47a for verbatim text.

8. Rule 59, Georgia Supreme Court, see Appendix L, pp. 47a-48a for verbatim text.

9. Ga. Code Ann. §110-1101, see Appendix L, pp. 48a-49a for verbatim text.

10. Ga. Code Ann. §110-1102, see Appendix L, p. 49a for verbatim text.

11. Ordinance No. 80-14, Columbus, Georgia, see Appendix L, pp.50a-54a for verbatim text.

12. Ordinance No. 80-24, Columbus, Georgia, see Appendix L, pp. 55a-57a for verbatim text.

STATEMENT OF THE CASE

This case has produced two appeals before the Supreme Court of Georgia and two records which will be noted hereafter as "R1" for the original phase of this case and "R2" for the present phase.

On November 15, 1976, Cross Country Plaza Shopping Center filed a Complaint for Declaratory and Equitable Relief in the Muscogee County Superior Court alleging violation of federal due process by the refusal of the Columbus Council to rezone a vacant lot from a residential to a commercial classification. The Complaint also invoked an irrelevant provision of the Georgia Constitution protecting religious opinions and freedom of conscience and a superfluous provision of

the Georgia Constitution prohibiting the taking or damaging of private property without just compensation, but the denial of federal due process constitutes the essence of the allegations: "The rejection of the application for rezoning of the Cross Country property by the Council was arbitrary, unreasonable, and confiscatory in nature in that it deprives the owners of the beneficial use of their property without due process of law and bears no relation to the public health, safety, morals or welfare and amounts to an abuse of the Council's discretion." (R1-3-10). Under the Georgia statutory scheme a declaratory judgment is not equitable in nature, even though *Ga. Code Ann.* §110-1101 and §110-1102 contain certain equitable provisions:

> "An action brought under the Declaratory Judgments Act (Ga. L. 1945, p. 137) is not an equitable proceeding per se. 'There is some difference of opinion as to the nature of declaratory judgment proceedings. It has been said that such proceedings are equitable in nature. Inasmuch, however, as the right to have declarations made is distinctly granted by statute, it would seem out of place not to consider the right a legal one, even though it may at the same time, in some instances, be in the nature of those heretofore denominated 'equitable.' 16 Am. Jur. Declaratory Judgments, p. 289, §15; 87 A.L.R. 1209." *Felton v. Chandler*, 201 Ga. 347 (2) (1946).

The decision of the Georgia Supreme Court in the case at bar was supposedly predicated on a rule fashioned in *Barrett v. Hamby*, 235 Ga. 262, 265 (1975):

> "As the individual's right to the unfettered use of his property confronts the police power under which zoning is done, the balance the law strikes is that a zoning classification may only be justified if it bears a substantial[1] relation to the public health, safety, morality or general welfare. Lacking such justification, the zoning may be set aside as arbitrary or unreasonable. *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928); *City of Thomson v. Davis*, supra, p. 221."

In reaching its decision the Court required that the zoning authority "justify its determination" (235 Ga. 262, 266), and the two dissenters — one of whom is now the Chief Justice and dissented in the present case — expressed a concern for both the ruling and the concept of forcing a legislative body to justify its decision (235 Ga. 262, 270):

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1 Though following its pronouncement in *Nectow* of a "substantial" relation test the Supreme Court has not further construed this term, it appears that "substantial" is more or less synonymous with "reasonable" (because the reasonableness of zoning on all the facts is the ultimate inquiry), and is clearly more than "any" evidence. See *Nectow*, supra, p. 187; 1 Rathkopf, The Law of Zoning and Planning, Ch. 5, p. 5-1 (1974); 8 McQuillin, Municipal Corporations, §§25.42-25.44 (3rd Ed. 1965); 1 Anderson, American Law of Zoning §2.22 (1968); 3 Anderson, §21.17.

> "The implication of the present decision is that every local zoning authority in Georgia (potentially every county and municipality in the state) must now justify to the court every disputed zoning decision it makes. The great danger inherent in this ruling is that it will necessarily substitute this court's judgment for the local governing authority's judgment when the evidence is in conflict, as it is in the present case."

Guhl v. Holcomb Bridge Road Corporation, 238 Ga. 322, 324 (1977) established certain "lines of inquiry" as relevent to determining the facts of a particular case:

> " 'A zoning ordinance is presumptively valid, and this presumption may be overcome only be clear and convincing evidence. The burden is on the plaintiffs. The validity of each zoning ordinance must be determined on the facts applicable to the particular case but certain general lines of inquiry have been regarded as relevant, to wit: (1) existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restrictions: (3) the extent to which the destruction of property values of the plaintiffs promotes the health, safety, morals or general welfare of the public; (4) the relative gain to the public, as compared to the

> hardship imposed upon the individual property owner; (5) the suitability of the subject-property for the zoned purposes; and (6) the length of time the property has been vacant as zoned, considered in the context of land development in the area in the vicinity of the property.' *LaSalle National Bank v. County of Cook*, 60 Ill. App. 2d 39, 51 (208 NE2d 430) (1965)."

These cases illustrate the factual nature of all such zoning disputes in Georgia together with the presumption of legislative validity which the plaintiff has the burden of overcoming, a balancing process which in the present case pits the Shopping Center's single affidavit by its President containing allegations of "negligible value" (R2-20) against the City's four affidavits by a planner, a resident who is a real estate broker, and two real estate appraisers that commercialization of the property would have an adverse affect on the adjoining residential neighborhood (R1-233-244) as well as deposition testimony by seven Councilmen reflecting a concern for commercial intrusion into a residential area. (R1-51, 62, 71, 73, 74, 82, 83, 96, 107, 123, 125, 126). The affidavit of the Cross Country President came as a new revelation after the initial phase of the case in which Cross Country placed comparable values of $110,000 (commercial) and $21,000 (residential) on this one acre lot, even though it would have presumably been used as a commercial parking lot under the same conditions as those which now allegedly render it worthless. (R1-165-168).

The present phase of this case results from a rather rapid dispensation of justice in the Muscogee Superior Court. On March 20, 1980, the city filed a Notice of Compliance with the previous order of the court invalidating the residential zoning: attached thereto was the presently disputed ordinance zoning the property commercial with the same conditions proposed by Cross Country in its original 1976 zoning petition. (R2-8-12). On April 3, 1980, Cross Country filed a Motion to declare the property free of zoning or to remand the case to Council with a direction to grant constitutional zoning. (R2-15-17, 24). On April 4, 1980, the City filed a Response opposing this motion and, among other things, asked for a hearing with testimony by witnesses to determine the facts of the case in order to comply with fundamental due process, including a trial by jury in accordance with its original request filed March 10, 1978. (R2-4-7, 25-28). On April 9, 1980, the Superior Court issued an Order granting Cross Country's Motion to invalidate the ordinance and remanding the matter to the Columbus Council with directions that it enact constitutional zoning or else face the alternative of a declaration by the Court that the property be free of all zoning. (R2-32, 33).

In addition to raising the federal grounds in the trial court by the request for an evidentiary hearing consistent with due process principles and the request for a jury trial, the City also reiterated these matters in its Enumeration of Errors filed in the Georgia appellate courts:

"1. The trial judge erred in conducting a hearing on a mere motion without a trial proceeding requiring more formal procedures. (R-32)."

. . .

"8. The trial judge erred in not accepting the positions taken by the City in its Response and Affidavit and Brief in Opposition to Plaintiff's Motion to Declare Property Free of Zoning or in the Alternative to Remand, and particularly but not limited to the City's request for a trial by jury. (R-4-6, 24-28, 32, 33)."

Once again, in its April 17, 1981 Motion for Rehearing, the City set out its positions. This motion gives a summary of the factual and legal matters which the Georgia Supreme Court overlooked, and it is set out in its entirety in the Appendix.

Since neither the trial court nor the appellate court addressed any of these federal questions but completely ignored them, the United States Supreme Court can assume that each of the points received a specific negative ruling. Rule 59, cited by the Georgia Supreme Court as the basis of its affirmance without opinions and reproduced among both the relevant statutes and in the Appendix, does not suggest any procedural error by the city in failing to raise these federal questions. Reliance on this rule really emphasizes the arbitrary

manner in which the Georgia judiciary has dealt with the legislative branch of this local government and the consequential need for federal judicial review on the basis of the general jusisdictional principle recently expressed in *Wood v. Georgia*, ____ U.S. ____ (at page 4, slip opinion; decided March 4, 1981); "Where, as here, a possible due process violation is apparent on the praticular facts of a case, we are empowered to consider the due process issue."

ARGUMENT

1. The Jury Trial Issue

The first question to determine is whether or not the case at bar is one of those "suits at common law" embodied in the Seventh Amendment, and both early and recent authority suggests an affirmative answer. Mr. Justice Story in *Parsons v. Bedford*, 3 Peters 433, 446, 447 (1830) wrote the opinion in the leading case defining the phrase "common law" as it appears in the Seventh Amendment:

> "The phrase 'common law,' found in this clause is used in contradistinction to equity, and admiralty, and maritime jurisprudence . . . By *common law* [the Framers of the Amendment] meant . . . not merely suits, which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and deter-

> mined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights."

Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) requires that the right to a jury trial be preserved in any case presenting both legal and equitable issues: "As long as any legal cause is involved the jury rights it creates control." (Footnote 8). *Simler v. Conner*, 372 U.S. 211 (1963) observed that federal policy favoring jury trials possessed an historic and continuing strength and applied the Seventh Amendment to actions for declaratory judgments. *Curtis v. Loether*, 415 U.S. 189 (1974) unanimously applied the Seventh Amendment to an action under the 1968 Civil Rights Act allowing redress for violation of fair housing provisions: "Although the Court has apparently never discussed the issue at any length, we have often found the Seventh Amendment applicable to causes of action based on statutes." 415 U.S. 189, 193 (several cited examples omitted). Mr. Justice Marshall in *Pernell v. Southall Realty*, 416 U.S. 363 (1974) continues the tradition of the leading case by applying the Seventh Amendment to an action to recover possession of real property: "Whether or not a close equivalent to §16-1501 existed in England in 1791 is irrelevant for

Seventh Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty." 416 U.S. 363, 375.

Petitioners are asking this court to overrule a long line of precedent which establishes that the Seventh Amendment requirement of a jury trial does not extend to the States under the Fourteenth Amendment[2], but the compelling reasons for doing so can be found by examining only two cases. Mr. Justice Jackson's opinion in the 5-4 decision of *Fay v. New York*, 332 U.S. 261 (1947) outlines the considerations and rules that had been involved until that time in applying the Bill of Rights and the Sixth and Seventh Amendments to the States under the due process clause and, although the rule of non-application remained intact in that case, the opinion contained a hint of future change:

> "The due process clause is one of comprehensive generality, and in reducing it to apply in concrete cases there are different schools of thought. One is that its content on any subject is to be determined by the content

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2 *Edwards v. Elliott* (1874, US) 21 Wallace 532; *Walker v. Sauvinet*, 92 U.S. 90 (1876); *Pearson v. Yewdall*, 95 U.S. 294 (1877); *Maxwell v. Dow*, 176 U.S. 581 (1900); *Slocum v. New York L. Ins. Co.*, 228 U.S. 364 (1913); *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211 (1916); *Fay v. New York*, 332 U.S. 261 (1947).

of certain relevant other Amendments in the Bill of Rights which originally imposed restraints on only the federal Government but which the Fourteenth Amendment deflected against the states. The other theory is that the clause has an independent content apart from, and in addition to, any and all other Amendments. This meaning is derived from the history, evolution and present nature of our institutions and is to be spelled out from time to time in specific cases by the judiciary.

To treat first of the former doctrine, it steadily has been ruled that the commandments of the Sixth and Seventh Amendments, which require jury trial in criminal and certain civil cases, are not picked up by the due process clause of the Fourteenth so as to become limitations on the states. 'This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether.' *Palko v. Connecticut*, 302 U.S. 319, 324, 82 L.ed 288, 291, 58 S.Ct. 149, and cases there cited. Unless we are now so to change our interpretation as to withdraw from the states the power so lately conceded to be theirs, this would end the matter under the view that the force of the due process clause is exhausted when it has applied the principles of other relevant Amendments.

> But this Court has construed it to be inherent in the independent concept of due process that condemnation shall be rendered only after a trial, in which the hearing is a real one, not a sham or pretense. *Palko v. Connecticut*, 302 U.S. 319, 327, 82 L.ed 288, 293, 58 S.Ct. 149; *Mooney v. Holohan*, 294 U.S. 103, 79 L.ed 791, 55 S.Ct. 340, 98 ALR 406; *Moore v. Dempsey*, 261 U.S. 86, 67 L.ed 543, 43 S.Ct. 265. Trial must be held before a tribunal not biased by interest in the event. *Tumey v. Ohio*, 273 U.S. 510, 71 L.ed 749, 47 S.Ct. 437, 50 ALR 1243."322 U.S. 261, 287, 288.

Duncan v. Louisiana, 391 U.S. 145 (1968) changed the rule of *Fay v. New York* by requiring the States to provide jury trials in criminal cases, and what the court said then in Mr. Justice White's opinion should be said again in the present case for jury trials in civil cases:

> "The test for determining whether a right extended by Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' *Powell v. Alabama*, 287 U.S. 45, 67 (1932); whether it is

'basic in our system of jurisprudence,' *In re Oliver*, 333 U.S. 257, 273 (1948); and whether it is 'a fundamental right, essential to a fair trial,' *Gideon v. Wainwright*, 372 U.S. 335, 343-344 (1963); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964); *Pointer v. Texas*, 380 U.S. 400, 403 (1965). The claim before us is that the right to trial by jury guaranteed by the Sixth Amendment meets these tests. The position of Louisiana, on the other hand, is that the Constitution imposes upon the States no duty to give a jury trial in any criminal case, regardless of the seriousness of the crime or the size of the punishment which may be imposed. Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee. Since we consider the appeal before us to be such a case, we hold that the Constitution was violated when appellant's demand for jury trial was refused." 391 U.S. 145, 148-150 (Footnotes omitted).

In their Motion for Rehearing before the Georgia Supreme Court, Petitioners in paragraphs 9-11 quoted various policy pronouncements extolling the virtues of jury trials in civil cases contained in *Parsons v. Bedford*, 3 Peters 433, 446 (1830), *Dimick v. Schiedt*, 293 U.S. 474,

485, 486 (1935), and *Jacob v. City of New York*, 315 U.S. 752 (1) (1941). These cases appear in the Appendix where the Motion is reproduced, and Petitioners call the Court's particular attention to the tradition that the Seventh Amendment right be "jealously guarded" by the courts.

2. The Due Process Issue

The Georgia Supreme Court has rendered a decision which grossly misconstrues the due process clause of the Fourteenth Amendment as this court has applied it to zoning matters. The leading case of *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926) established the power of local governments to enact zoning ordinances despite a complaint that such restrictions deprive a property owner of liberty and property without due process and equal protection of the law — the question was deemed to be the same under both the Ohio and United States Constitutions:

> "The question is the same under both constitutions, namely, as stated by appellee: Is the ordinance invalid in that it violates the constitutional protection 'to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory'?" 272 U.S. 365, 386.

Immediately after the question, Mr. Justice Southerland's opinion begins with the observation that although such regulations might have been rejected in the previous century, modern conditions are so apparent as to necessitate that they now be "uniformly sustained." 272 U.S. 365, 387. Such an observation suggests that the Georgia decision now under review is not only out of kilter with the United States Supreme Court but also with the appellate courts of other jurisdictions. Then another observation suggests the anomaly of the Georgia decision and makes a point which the Petitioners have unsuccessfully called to the attention of the Georgia courts: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." 272 U.S. 365, 388. Even the factual situation in *Euclid* was similar to the situation in Columbus, Georgia, for the question involved the validity of "the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded." 272 U.S. 365, 390. In allowing such zoning *Euclid* approved a conclusion reached by the Louisiana Supreme Court — the same sort of conclusion which the Georgia Supreme Court should have reached in the present case:

> "The Supreme Court of Louisiana, in *State ex rel. Civello v. New Orleans*, 154 La. pp. 282, 283, 33 A.L.R. 260, 97 So. 440, said:

'In the first place, the exclusion of business establishments from residence districts might enable the municipal government to give better police protection. Patrolmen's beats are larger, and therefore fewer, in residence neighborhoods than in business neighborhoods. A place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregations need police protection. In the second place, the zoning of a city into residence districts and commercial districts is a matter of economy in street paving. Heavy trucks, hauling freight to and from places of business in residence districts, require the city to maintain the same costly pavement in such districts that is required for business districts; whereas, in the residence districts, where business establishments are excluded, a cheaper pavement serves the purpose . . .

'Aside from considerations of economic administration, in the matter of police and fire protection, street paving, etc., any business establishment is likely to be a genuine nuisance in a neighborhood of residences. Places of business are noisy; they are apt to be

disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc.

. . .

'If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot — not the courts.' " 272 U.S. 365, 393.

Euclid went on to reason along lines suggesting justification of the Columbus Council's action in this case — especially when the court considers that Cross Country's proposed ordinance which was defeated by the Columbus Council provides for A-O zoning (R2-13-17) — a classification which is entitled "Apartment-Office District," a matter which can be readily ascertained by a simple supplement to this record:

"The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports.

These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturb-

ing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities, — until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances." 272 U.S. 365, 394, 395.

All of this analogous rationale leads to a conclusion which should govern the outcome of this case:

"If these reasons, thus summarized, do not demonstrate the wisdom of sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. *Thomas Cusack Co. v. Chicago*, 242 U.S. pp. 530, 531, 61 L.ed. 475, 476, L.R.A. 1918A,

136, 37 Sup. Ct. Rep. 190, Ann. Cas. 1917C, 594; *Jacobson v. Massachusetts*, 197 U.S. 11, 30, 31, 49 L.ed. 643, 651, 652, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765." 272 U.S. 365, 395.

Petitioners have analyzed and quoted *Euclid* at some length not only because it is the leading case but also because it is factually analogous to such zoning matters as this Petition presents. At the same term in which *Euclid* was decided, this court also decided *Zahn v. Board of Public Works of the City of Los Angeles*, 274 U.S. 325 (1927), which also presented analogous matters of fact: property on a main artery of travel was zoned residential and its value would be greatly enhanced if available for business purposes. In upholding the California Supreme Court, the United States Supreme Court reasoned that the due process and equal protection clause of the Fourteenth Amendment precluded any judicial interference with the legislative decision of the city council:

> "The common council of the city, upon these and other facts, concluded that the public welfare would be promoted by constituting the area, including the property of plaintiffs in error, a zone "B" district; and it is impossible for us to say that their conclusion in that respect was clearly arbitrary and unreasonable. The most that can be said is that whether that determination was an unreasonable, arbitrary or unequal exercise of power is fairly

> debatable. In such circumstances, the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." 274 U.S. 325, 328.

We doubt that this court, for the purposes of granting certiorari and reversing the Georgia Supreme Court in the case at bar, has spoken more cogently or more appropriately than in these early cases. Suffice it to say that the numerous instances in both federal and state jurisdiction in which *Euclid* and *Zahn* have been applied and followed suggest a serious aberration from the federal constitutional norm as reflected in both federal and state decisions requiring supervision and correction by this Court.

In addition to ignoring federal due process rules that have developed in zoning matters, the trial and appellate courts of Georgia have ignored the general rules of due process because of their failure to follow even rudimentary due process in arriving at a factual basis for their conclusions. The proceeding before the Muscogee Superior Court was *ex parte* in nature, a peremptory grant of a flimsily-supported motion. The Georgia Supreme Court did nothing to enlighten anyone as to the rationale for the trial court's arbitrary conclusion, but instead spared itself the trouble of trying to justify its affirmance by any recitation of facts or

law. Petitioners represent all of the people of Columbus, Georgia, including those citizens whose residential property is adversely affected by the commercial encroachment which the decision below requires. It requires only casual analysis of the facts of the case to conclude that the Columbus Council and the adjoining landowners have been denied a meaningful hearing and thereby deprived of their property rights in violation of the due process rule enunciated by Mr. Justice Stewart in *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972): "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions." Such an adversary hearing as the Petitioners requested would have been particularly meaningful in the present case where the final judgment was rendered on the basis of a self-serving motion and affidavit which the trial court and the appellate court apparently accepted without question, all of which suggests a blatant breach of the due process principle enunciated by Mr. Justice Brennan in *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970): "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."

CONCLUSION

The preceding facts and arguments present two clear reasons for granting the writ of certiorari and reversing the Georgia Supreme Court; and, although each

standing alone constitutes an adequate ground, both present appropriate issues to which this court should address itself. The Seventh Amendment jury trial issue obviously needs attention in light of the transition of the Sixth Amendment from exclusion to inclusion under the Fourteenth Amendment. Petitioners see no reason for a national judicial policy which makes the rights of criminal defendants more sacrosanct than the rights of civil defendants, particularly when the case really involves the whole people as defendants as represented by the members of their elected governing authority. Nor do Petitioners see any reason for the due process clauses of the Fourteenth and Fifth Amendments to have a peculiar and unique meaning or application in Georgia, not only in matters relating to zoning and the presumption of legislative validity but also in all of those procedural matters such as confrontation and cross-examination which amount in their sum to a fair trial or hearing. The people of Columbus, Georgia have been abused in a matter which ought to constitute an embarassment to the State of Georgia, and they ask this court of last resort to rectify this situation.

Respectfully submitted,

EUGENE HARDWICK POLLEYS, JR.
Associate City Attorney

P. O. Box 1340
Columbus, Georgia 31993
Attorney of Record for Petitioner
Telephone: (404) 324-7711
Extension 453

CERTIFICATE OF SERVICE

I certify that I have caused to be served the necessary copies of this petition on Mr. Frank Love, Jr., 1100 C&S National Bank Building, Atlanta, Georgia 30303 and Mr. Milton Hirsch, P.O. Box 1172, Columbus, Georgia 31902, by causing the printer to place said copies in the United States mail, postage prepaid.

I further certify that all parties required to be served have been served.

This ____ day of July, 1981.

EUGENE HARDWICK POLLEYS, JR.

APPENDIX A

SUPREME COURT OF GEORGIA
ATLANTA

No. 37047

May 12, 1981

The Honorable Supreme Court met pursuant to adjournment.

By Marshall, J.

The following direction was given:

JACK P. MICKLE, MAYOR, ET AL.,

versus

CROSS COUNTRY CORPORATION d/b/a CROSS COUNTRY PLAZA SHOPPING CENTER

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on 4-8-81 such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that Court.

/s/ Thomas O. Marshall
Thomas O. Marshall
Justice

APPENDIX B

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA MAY 5, 1981

The motion for a rehearing was denied today: Case No. 37047, MICKLE, MAYOR, ET AL. versus CROSS COUNTRY CORP. d/b/a CROSS COUNTRY PLAZA SHOPPING CENTER

Jordan, C. J., dissents

Yours very truly,

MRS. JOLINE B. WILLIAMS,
Clerk

APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF GEORGIA

JACK P. MICKLE, ET AL.,
Appellants,

versus Case No. 37047

CROSS COUNTRY CORPORATION, d/b/a CROSS COUNTRY PLAZA SHOPPING CENTER,
Appellee.

MOTION FOR REHEARING

Appellants move for a rehearing and reversal of the decision rendered by this Court on April 8, 1981, affirming without opinion a decision of the Muscogee Superior Court rendered April 9, 1980, copies of both of which are attached to this Motion. Movant shows that the court overlooked certain material facts and certain constitutional provisions, certain statutes, and certain decisions which will be set forth hereinafter:

1.

The court has overlooked all of the following material facts which are contained in the record provided in the present case, (a record made subsequent to this Court's previous case numbered 35315):

(a) Both the Muscogee Superior Court and this Court have denied by inaction Movants' timely request for a trial by jury filed originally on March 10, 1978 during the first phase of this case (R-4-7) and reiterated during the second phase of this case in Movants' April 4, 1980 response to Plaintiff's Motion to Declare Property Free of Zoning or in the Alternative to Remand (R-25-28).

(b) Various "whereas" clauses in the zoning ordinance involved by the Superior Court, particularly those clauses suggesting that the conditions attached to the C-2 (commercial) classification were not only originally considered appropriate by Cross Country but were considered by Council to be in the general public interest in making the previous court ordered change from an R-1A (residential) classification. (R-8-14).

(c) Plaintiff, as indicated in its own Motion and affidavit, originally acceded to the conditions contained in the ordinance; these conditions were not considered in 1976 to render the value of the property negligible, nor does Plaintiff advance any reason other than its own preference for usage to support its claim that the value in 1980 was negligible because of the conditions. (R-15-21).

(d) As indicated by Movants' Response and Affidavit and Brief in Opposition to Plaintiff's Motion, Plaintiff's new preference for property usage comes

after completion of the initial phase of this case in which the conditions were presumed to be satisfactory; and this change of position and all circumstances required a full hearing and a jury trial in accordance with the original request. (R-25-28).

(e) Plaintiffs knew of the use of certain other sections of the shopping center for the Smuggler's Inn and the La Quinta Motor Inn prior to the February 26, 1979 Muscogee Superior Court order in the initial phase of this case but failed to call to the attention of that Court any new preference for use of the subject tract — even through this new preference items directly from the fact that the two inns replaced contemplated food chain or free-standing restaurants requiring more parking than the two inns. (R-8, 19, 29-31).

2.

The court has overlooked the following material facts which were a part of the record in the initial phase of this case (Supreme Court Case No. 35315) which suggest that the conditions imposed by Council in the ordinance now under review were appropriate to minimize the intrusion upon the neighboring residential property:

(a) Affidavit of the Columbus City Engineer indicating that rezoning the subject property from residential to commercial would increase runoff into a

stream which had a history of flood problems. (R-229, 230).

(b) Affidavit of the Columbus Commercial Real Estate Appraiser stating that the commercialization of the subject property would have an adverse effect on adjoining or neighboring residential property and that depreciation in value is an inherent feature of such a change in zoning use. (R-233, 234).

(c) Affidavit of the Principal Planner of the Columbus Planning Division indicating that residential zoning for the subject property was consistent with sound planning and zoning concepts and that the subject lot if zoned commercial would constitute a jagged indentation into a predominantly residential neighborhood and would create commercial spillover into the residential neighborhood tending to lessen its value for residential purposes. (R-235, 236).

(d) Affidavit of Mr. Lee D. Chilson, an active real estate broker and a participant in the real estate business for over 40 years and who had been a resident of the neighborhood in question in this case since 1962, and a qualified property appraiser for a period of over 10 years, who had built his home in plain view of the subject property in reliance on the then existing residential classification and who had seen the destruction of pine trees by a contractor acting on behalf of Cross Country Plaza Shopping Center (a factor which the shopping center's own appraiser on page 1o7 of the

Supreme Court record uses to support his conclusion that the property has only a minimal value for residential purposes), and who had been a witness and had experienced the sales resistance to those parcels of property located in close proximity to commercial developments and who had witnessed the detrimental effect of the continuing insistence of Cross Country Plaza in rezoning the subject parcel from residential to commercial uses, (R-237-241).

(e) Affidavit of Robert W. Hendrix, a real estate broker and appraiser who pointed out the adverse effect of commercialization of property on adjoining or nearby residential property and who supported a conclusion with specific instances applicable to the present neighborhood and who pointed out the obvious fact that the very complaint raised by Cross Country Plaza as to one reason for the reduced residential value of the subject tract, that is to say because of the fact that the subject tract is bordered on two sides by commercial property, would have the exact same detrimental effect on the next residential lots down Birchfield Drive and Fremont Avenue in the adjoining residential neighborhood. (R-242-244).

(f) Depositions of the seven Councilmen who voted against the original zoning petition reflecting a concern for commercial intrusions into a residential area. (R-51, 62, 71, 73, 74, 82, 83, 96, 107, 123, 125, 126).

3.

The court has overlooked the authorities cited in Topic A of Movants Argument in their Brief filed previously supporting the proposition that the Superior Court should have allowed a trial proceeding: *Ga. Code Ann.* 81A-156 (c); *Ginn v. Morgan*, 225 Ga. 192 (1969); *Howard v. Walker*, 242 Ga. 406 (1978).

4.

The court has overlooked the *Black's Law Dictionary* definitions of "fair market value," "estoppel," "laches," and "waiver" which support Topic B of Movants' Argument suggesting the relevance of the various affirmative defense originally filed in response to the complaint.

5.

The court has overlooked *Barrett v. Hamby*, 235 Ga. 262 (1975), which established the balancing test for judicial review of zoning regulations; *Guhl v. Par-3 Golf Club, Inc.*, 238 Ga. 43 (1976), which holds that it is not sufficient merely to establish that a more profitable use could be made of property; *Cross v. Hall County*, 238 Ga. 709 (2) (1977), which allows conditional zoning for "the protection or benefit of neighbors to ameliorate the effects of the zoning change"; and *Avera v. City of Brunswick*, 242 Ga. 73, 74 (1978), which holds that "the rezoning of one lot in a residential district lowers the

values of the residential district" and which prohibits "spot" rezoning (as is the case here for Plaintiff's proposed A-0 zoning) — all of which appear in Topic C of the Argument and which suggest that neither an ex parte nor summary nor trial judgment for Plaintiff is authorized in this case.

6.

The court has overlooked the long line of authority cited in Topic D of the argument supporting the presumptive validity of legislative action and has misapplied the due process clauses of the United States Constitution: *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *Zahn v. Board of Public Works of City of Los Angeles*, 274 U.S. 325 (2) (1927); *Hall Paving Company v. Hall County*, 237 Ga. 14, 16 (1976); *Guhl v. Holcomb Bridge Road Corp.* 238 Ga. 322, 323 (1977); *Cross v. Hall County*, 238 Ga. 709, 711 (1979); *Vance v. Bradley*, ____ U.S. ____, at page 17 of the slip opinion, (Decided February 22, 1979).

7.

The court has overlooked *Dekalb County v. Post*, 245 Ga. 214, 217 (1980), cited in Topic E of the argument, which holds that the Superior Court cannot pass on the constitutionality of the zoning ordinance when no constitutional challenge is made before the governing authority.

8.

The court has overlooked Movants' Request for trial by jury (R-4-8) which contains both state and federal authorities in support of said request and the court has overlooked all of the state and federal authorities contained in a brief in support of this request which was originally submitted to the Muscogee Superior Court on March 10, 1978 and which was attached to the Brief submitted to this Court in support of Topic F of the argument to the effect that Movant was entitled to a trial by jury either under the statutory law of Georgia or the Seventh and Fourteenth Amendments of the Constitution of the United States.

9.

The court has overlooked *Parsons v. Bedford, 3 Peters 433, 446 (1830):* "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the seventh amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights

and liberties of the people. This amendment declares that 'in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law.' "

10.

The court has overlooked *Dimick v. Schiedt, 293 U.S. 474, 485, 486 (1935):* "The right of trial by jury is of ancient origin, characterized by Blackstone as 'the glory of the English law' and 'the most transcendent privilege which any subject can enjoy' (Bk. 3, p. 379); and, as Justice Story said (2 Story, Const. §1779), '. . . the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.' With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. Compare *Patton v. United States, 281 U.S. 276, 312, 74 Led. 854, 869, 50 S.Ct. 253, 70 A.L.R. 263.*"

11.

The court has overlooked *Jacob v. City of New York, 315 U.S. 752 (1) (1941):* "The right of jury trial in civil cases at common law, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

12.

The court has overlooked *Ross v. Bernhard, 396 U.S. 531, 533 (1970):* "The Seventh Amendment preserves to litigants the right to jury trial in suits at common law 'not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.' *Parsons v. Bedford, 3 Pet. 433, 447 (1830).*"

13.

By allowing a declaration of rights without any adverse hearing with only the benefit of a self-serving motion and affidavit (R-15-21) the Court has ruled contrary to Movants' protests (R-28), violated fun-

damental provisions of due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, thereby overlooking *Goldberg v. Kelly, 397 U.S. 254, 269 (1970):* "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *E.g., ICC v. Louisville & N. R. Co., 227 U.S. 88, 93-94 (1913); Willner v. Committee on Character & Fitness, 373 U.S. 96, 103-104 (1963).*"

14.

The court, in allowing a legislative enactment of the Columbus governing authority to be so peremptorily set aside, has overlooked Article IV, Section 4, of the Constitution of the United States *(Ga. Code Ann 1-407)* which provides the guarantee of a republican form of government in every State: instead we have government by the motion of lawyers and the affidavit of shopping center owners.

Respectfully submitted this the 17th day of April, 1981.

/s/ LENNIE F. DAVIS
LENNIE F. DAVIS
City Attorney

/s/ E. H. POLLEYS, JR.
E. H. POLLEYS, JR.
Associate City Attorney
P.O. Box 1340
Columbus, Georgia 31993
(404) 324-7711 Ext. 453

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion for Rehearing on Mr. Frank Love, Jr., 1100 C&S National Bank Building, 35 Broad Street, N.W., Atlanta, Georgia, 30335, and Mr. Milton Hirsch, P. O. Box 469, Columbus, Georgia, 31902, Attorneys for Appellee, by placing said copies in the United States mail, postage prepaid.

This the 17th day of April, 1981.

/s/ E. H. POLLEYS, JR.
E. H. POLLEYS, JR.

APPENDIX D

In the Supreme Court of Georgia

Decided: April 8, 1981

No. 37047

MICKLE et al.,

versus

CROSS COUNTRY CORPORATION d/b/a CROSS COUNTRY PLAZA SHOPPING CENTER.

MARSHALL, Justice.

Judgment affirmed without opinion pursuant to Rule 59.

All the Justices concur, except Jordan, C.J., who dissents.

APPENDIX E

IN THE
SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

CROSS COUNTRY CORPORATION d/b/a Cross Country Plaza Shopping Center,
Plaintiff,

versus C.A. File No. 70525
MOTION

JACK P. MICKLE, et al.,
Defendant.

ORDER

Plaintiff having moved the Court to declare the property which is the subject matter of this litigation free of zoning or, in the alternative, to remand the case to the Council of the City of Columbus, with the direction that they grant constitutional zoning and said Motion having come on regularly for hearing and the Court having considered evidence submitted on behalf of the Plaintiff and Defendant's argument of counsel and citation of authority finds as follows:

The action of the City Council by Ordinance of March 19, 1980 purporting to rezone the subject property C-2 but attaching the following restrictions and conditions:

1. The parcel to be used exclusively for parking for a period of at least 20 years.

2. Cross Country Plaza Shopping Center to erect a 55 inch brick wall along Birchfield Drive and along the westerly line of this parcel.

3. Cross Country Plaza Shopping Center to construct a sidewalk along Birchfield Drive.

4. Cross Country Plaza Shopping Center to maintain appropriate landscaping outside the brick wall.

was arbitrary, capricious, discriminatory, unreasonable and without regard or consideration of the interests of the owner of the property and bears no relation to a concern for the health, welfare and safety of the community. This Court, following the directive of the Supreme Court of Georgia in the case of *DeKalb Co. v. Flynn*, 243 Ga. 679, remands the matter to the Council of the City of Columbus with the direction that, within 60 days from the date of this Order Council provide constitutional zoning for the subject property and upon failure of which and upon motion by the Plaintiff this Court will declare the subject property free of zoning and enjoin any further attempt on the part of the Council of the City of Columbus from attempting to restrict by zoning the use of the property by its owner.

SO ORDERED this 9th day of April, 1980.

/s/ OSCAR D. SMITH, JR.
Judge, Superior Court,
Muscogee Co., Ga.

APPENDIX F

IN THE
SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

CROSS COUNTRY CORPORATION, d/b/a CROSS COUNTRY PLAZA SHOPPING CENTER,
Plaintiff,

versus C.A. File No. 70525

JACK P. MICKLE, et al.,
Defendants.

RESPONSE AND AFFIDAVIT AND BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO DECLARE PROPERTY FREE OF ZONING OR IN THE ALTERNATIVE TO REMAND

The action of the Council of Columbus, Georgia in response to the order of this Court previously entered and previously affirmed by the Supreme Court of Georgia has been made a matter of record in this Court

by a Notice of Compliance which contains as attachments thereto two alternative ordinances which were proposed to the Council of Columbus, Georgia, one of which was defeated and the other of which was enacted. This notice and particularly the second paragraph thereof is adopted as a part of this response and affidavit and brief. A number of "whereas" statements precede the ordinance which was enacted by the Council in response to the Court order and these statements recite the history of the case as well as the Council's current position in this matter: these statements are also made a part of this response and affidavit and brief.

As indicated by the Plaintiff's motion and the affidavit in support of the motion and the entire record of this case, the controversy over the subject property wended through the Georgia legal system under the assumption that the property would be used as a parking lot and would be subject to all of the restrictions which the Plaintiff originally agreed to impose upon itself. It is assumed that both the trial judge and the justices of the Supreme Court were aware of this prospective use and these restrictions when they rendered their respective decisions. For that matter, one of the questions addressed to counsel for the Defendants by the Chief Justice during oral argument at which counsel for the Plaintiff was present suggested that the Chief Justice was aware of these restrictions and also created an impression in the mind

of counsel for the Defendants that such restrictions would minimize, at least in the mind of the Chief Justice, the impact upon the adjoining neighborhood. All of these factors raise the obvious question as to whether or not the decision of the Superior Court in the first instance or the Supreme Court on appeal would have been the same had the zoning petition not contained any restrictive use for the subject property. It is only after the process of hearing at trial level and the process of hearings on the appellate level have been completed and all of the decisions of the courts now made final that the Plaintiff comes forward with the theory that he no longer needs the subject property for the use for which he originally intended it and now needs additional relief never contemplated by any of the courts which adjudicated this matter in its previous stages. Such an attempt to change the entire complexion of this case at this late date raises serious questions of fundamental due process of law and it also should raise questions in the mind of the Court as to the renewed vitality of the original affirmative defenses of laches, estoppel and waiver, which were raised by the Defendants in their pleadings in response to the original complaint.

The affidavit of the Plaintiff's president states that the property now is of only negligible value and unmarketable, but in no way does this affidavit explain how the value of $110,000 placed upon the subject property by its appraiser and by the president in their affidavits in support of their motion for a summary

judgment now vanishes into thin air and becomes of no import in this matter. An examination of the record in this case clearly indicates that the value placed upon the subject property was apparently arrived at by dividing the total acreage in the shopping center by the value placed upon the entire shopping center by the Tax Assessor. This point was made in oral argument before the Supreme Court and counsel for the Defendants observed that this was an arbitrary figure which took no account for all of the expensive buildings and improvements that had been made upon the rest of the shopping center so as to generate income and so as to create an overall value on the entire shopping center by the income method of evaluation which the affidavit of the City's Property Appraiser indicates was the method used for evaluating the property for tax purposes. Obviously, however the $110,000 figure was accepted by both the Superior and Supreme Courts, so it is now the established "fact and law of the case." This current attempt by the president of the shopping center to place a new value on the subject property is purely conclusory and is of no evidentiary value, and it does not even use the correct standard of value — only the alleged value *to the Plaintiff:* fair market value is the "price at which a willing seller and a willing buyer will trade" (*Black's Law Dictionary*), and Plaintiff has already set this price *with judicial approval.*

The consequences of granting the Plaintiff's current motion are appalling, for to do so would be to allow the

Plaintiff relief on a post-trial motion and on a post-appeal motion which is completely contrary to any original relief requested by the Plaintiff and in doing so the Court would be bypassing all of the orderly processes of litigation which have been contemplated in all civil actions and which have been contemplated in zoning matters by *Barrett v. Hamby*, 235 Ga. 262 (1975) and its successor cases. It is inconceivable that the Council's action cannot be considered proper compliance with the original order of the Superior Court which was affirmed by the Supreme Court. For all the Council has done is to grant the Plaintiff what it originally requested before the Council of Columbus, Georgia and which they impliedly requested during the entire course of this litigation. Due process rights of the Defendants and due process rights of all the property owners in the affected neighborhood would suggest at least as a minimum requirement that the Court if it contemplates granting the relief requested by this motion reopen the entire matter for a full-blown hearing with testimony by witnesses and with the assistance of a jury trial in accordance with the original request for a jury trial made by the Defendants during the previous proceedings of this case.

All factual matters stated in this Affidavit and Response and Brief in Opposition to the Plaintiff's Motion are within my personal knowledge and, in conclusion, Defendants respectfully submit that the Court allow the ordinance of the Council of Columbus,

Georgia to remain intact and to deny the Plaintiff's motion.

Respectfully submitted this 4th day of April, 1980.

/s/ E. H. POLLEYS, JR.
E. H. POLLEYS, JR.
Associate City Attorney
P. O. Box 1340
Columbus, Georgia 31902

VERIFICATION

GEORGIA, MUSCOGEE COUNTY

Personally appeared before the undersigned officer duly authorized to administer oaths in said State and County, E. H. POLLEYS, JR., Associate City Attorney, who, after being duly sworn, deposes and says on oath that the allegations of fact contained in the foregoing Affidavit and Motion and Brief are true.

This the 4th day of April, 1980.

/s/ E. H. POLLEYS, JR.
E. H. POLLEYS, JR.

/s/ CYNTHIA LYNN EASON
Notary Public, Muscogee County
Georgia.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing pleading on opposing counsel by placing a copy in the United States mail, postage prepaid.

This 4 day of April, 1980.

/s/ E. H. POLLEYS, JR.
E. H. POLLEYS, JR.

APPENDIX G

IN THE
SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

CROSS COUNTRY CORPORATION d/b/a Cross Country Plaza Shopping Center,
Plaintiff,

versus C.A. File No. 70525

JACK P. MICKLE, et al.,
Defendants.

NOTICE OF COMPLIANCE WITH COURT ORDER

Defendants in the above styled action, pursuant to the previously entered Order of this Court, have rezoned the parcel of land which was the subject of this litigation in accordance with the attached ordinance of Columbus, Georgia. Attached also in this notice is a copy of an alternative ordinance which was defeated by the Council of Columbus, Georgia.

Defendants submit that the attached enacted ordinance fully complies with the original request of the Plaintiff in its 1976 rezoning petition, fully complies with the Findings of Fact and Conclusions of Law made by this Court in its Order of February 26, 1979, which was affirmed January 8, 1980, by the Supreme Court of

Georgia, and fully complies with the concept of conditional zoning approved by the Supreme Court in *Cross v. Hall County*, 238 Ga. 709 (2) (1977).

This 20 day of March, 1980.

/s/ E. H. POLLEYS, JR.
E. H. POLLEYS, JR.
Associate City Attorney
P. O. Box 1340
Columbus, Georgia 31902

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing notice on the opposing counsel by placing said copies in the United States mail, postage prepaid: Honorable Milton Hirsch of Hirsch, Beil & Partin, P.O. Box 1172, Columbus, Georgia 31902; Honorable Paul Kilpatrick, Jr., of Martin, Kilpatrick & Davidson, P.O. Box 2828, Columbus, Georgia 31902; and Honorable Frank Love, Jr., of Powell, Goldstein, Frazer & Murphy, 1100 C&S National Bank Bldg., Atlanta, Georgia, 30303.

This 20 day of March, 1980.

/s/ E. H. POLLEYS, JR.
E. H. POLLEYS, JR.
Associate City Attorney

APPENDIX H

IN THE
SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

CROSS COUNTRY CORPORATION d/b/a Cross Country Plaza Shopping Center,
Plaintiff,

versus C.A. File No. 70525

JACK P. MICKLE, et al.,
Defendants.

MOTION

NOW COMES Plaintiff and moves the Court to declare the property which is the subject matter of this litigation free of zoning or, in the alternative, to remand the case to the Council of the City of Columbus with the direction that they grant constitutional zoning, and shows to the Court as follows:

1.

On the 7th day of June, 1976 plaintiff applied to the City of Columbus for C-2 zoning on the subject property and, in an effort to assure that such zoning be granted, the following conditions were agreed to by plaintiff should the property be zoned:

1. The parcel to be used exclusively for parking for a period of at least 20 years.

2. Cross Country Plaza Shopping Center to erect a 55 inch brick wall along Birchfield Drive and along the westerly line of this parcel.

3. Cross Country Plaza Shopping Center to construct a sidewalk along Birchfield Drive.

4. Cross Country Plaza Shopping Center to maintain appropriate landscaping outside the brick wall.

2.

At the time the zoning was applied for, plaintiff anticipated a need for additional parking according to the then existing plan for the development of Cross Country Shopping Plaza (See Affidavit of Lawrence I. Thorpe filed herewith).

3.

After having agreed to the extremely restrictive conditions, plaintiff's application for zoning was still denied by the City of Columbus although approved and recommended by the Planning Advisory Commission and the Planning Division. Subsequently, this action

was filed and, during the course of years this case has been in litigation, the development of Cross Country Shopping Center Plaza was altered, at least in part, because of the doubt as to what if any use plaintiff might make of its property which is the subject matter of this litigation. In specific, three acres of the shopping center, undeveloped at the time of the 1976 zoning application, was developed with self-contained parking, obviating any need for parking on the subject property.

4.

On February 12, 1979 this Court found on Motion For Summary Judgment by the plaintiff that the refusal of the City of Columbus to zone the subject property from R-1A to C-2 was a violation of constitutional rights of the plaintiff and that upon failure of the City of Columbus to grant constitutional zoning within sixty days from the date this Court's Order became a final judgment, the property would be free from zoning.

5.

On the 8th day of January, 1980 the Supreme Court of the State of Georgia affirmed this Court's Order without opinion.

6.

Subsequent to the decision of the Supreme Court and after the decision of the Supreme Court was made

the judgment of this Court, plaintiff, again in an effort to compromise all issues and create the least furor in the community, agreed to and filed an application that the property be zoned from R-1A to A-0. Plaintiff did so even though the A-0 classification is more restrictive in the uses that could be made of plaintiff's property than C-2, the zoning of plaintiff's contiguous property.

7.

Again, despite efforts of the plaintiff to be conciliatory and compromising, the Council of the City of Columbus denied A-0 zoning, zoned the property C-2 restricting its use for parking for a period of twenty years, and imposing all of the other restrictions hereinabove described.

8.

The Council of the City of Columbus took such action knowing that the effect would be to render the property effectively useless to the plaintiff, and such action on the part of the Council of the City of Columbus appears to be vindictive and arbitrary and totally without regard to any consideration of public health, safety or welfare or the constitutional rights of the plaintiff. The action of the Council is therefore unconstitutional in violation of Article 1, Section 1, Paragraph 3 of the Georgia Constitution (*Code Ann.*, §2-103), Article 1, Section 3, Paragraph 1 of the Georgia Constitution (*Code Ann.*, §2-301), and the due process

clause of the Fourteenth Amendment to the Constitution of the United States (*Code Ann.*, §1-815) and results in relatively little gain or benefit to the public while inflicting serious injury and loss on the owners of the property.

WHEREFORE, plaintiff prays that this Court declare plaintiff's property, which is the subject matter of this litigation, free of zoning or, in the alternative, remand the matter to the said Council of the City of Columbus with direction.

POWELL, GOLDSTEIN,
FRAZER & MURPHY
/s/ FRANK LOVE, JR.
FRANK LOVE, JR.

1100 C&S National Bank Building
Atlanta, Georgia 30303
(404) 572-6600

HIRSCH, BEIL & PARTIN, P.C.
/s/ MILTON HIRSCH
MILTON HIRSCH

Attorneys for the Plaintiff

P. O. Box 469
Columbus, Georgia 31902
(404) 323-6581

NOTICE OF MOTION

TO: Defendant, Jack P. Mickle, et al., and their attorney of record, Mr. Lennie Davis, The Government Center, Columbus, Georgia

Please take notice, that the undersigned will bring the above motion on for a hearing before this Court at 11:00 a.m. on the 8th day of April, 1980, before the Honorable Oscar D. Smith, Jr., Judge, Muscogee Superior Court, 11th Floor, Government Center, Columbus, Georgia, or as soon thereafter as counsel can be heard.

HIRSCH, BEIL & PARTIN, P.C.

/s/ MILTON HIRSCH
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 3 day of March, 1980.

/s/ MILTON HIRSCH
MILTON HIRSCH
Attorney for Plaintiff

APPENDIX I

JANUARY TERM, 1980

35315. MICKLE et al v. CROSS COUNTRY CORPORATION.

Judgment affirmed without opinion pursuant to Rule 59.

All the Justices concur.

ARGUED SEPTEMBER 18, 1979 — DECIDED JANUARY 8, 1980 — REHEARING DENIED JANUARY 23, 1980.

Zoning; constitutionality of ordinance. Muscogee Superior Court. Before Judge Smith.

Lennie F. Davis, E. H. Polleys, Jr., for appellants.

Powell, Goldstein, Frazer & Murphy, Frank Love, Jr., Martin, Kilpatrick & Davidson, Paul Kilpatrick, Jr., for appellee.

APPENDIX J

IN THE
SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

CROSS COUNTRY CORPORATION d/b/a Cross Country Plaza Shopping Center,
Plaintiff,

v. CA No. 70525

JACK P. MICKLE as Mayor of the City of Columbus, A. J. McCLUNG as Mayor Protem of the City of Columbus, HENRY N. BARBIAN, JACK B. BASSET, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK LAND, ALAN G. NICAS, LEWIS POWELL, and ROBERT L. WRIGHT as Councilmen of the City of Columbus, and THE CITY COUNCIL OF COLUMBUS, GEORGIA,
Defendants.

ORDER

Plaintiff and defendant having each filed their separate motions for summary judgment and the above case having come on regularly before the undersigned for presentation of evidence and argument on February 5, 1979, and the Court having considered the relevant portions of all affidavits submitted by both plaintiff and defendants, the various documents in-

troduced, relevant portions of the depositions on file, the verified complaint and relevant portions of answers to interrogatories, and after extensive argument and citation of authority by counsel for plaintiff and defendants, the Court finds as follows:

Plaintiff was substantially damaged by the refusal of the City Council of Columbus to rezone plaintiff's property from R-1A to C-2 in accordance with plaintiff's application for rezoning. Plaintiff was not only effectively deprived of the use of their property, but have likewise suffered substantial monetary damage because of the unsuitability of the subject property for residential development and the substantial difference in value of the property zoned as R-1A and the property zoned C-2. The Court also finds that the zoning classification maintained and enforced by the City Council of Columbus bore no substantial relation to the public health, safety, morality or general welfare of the community. Lacking such justification, the Court finds and declares that the action of the City Council of Columbus was arbitrary and unreasonable and in violation of Article 1, Sec. 1, Par. 3 of the Georgia Constitution (Code Ann. §2-103), Article 1, Sec. 3, Par. 1 of the Georgia Constitution (Code Ann. §2-301), and the due process clause of the Fourteenth Amendment to the Constitution of the United States (Code Ann. §1-815). (See *Barrett v. Hamby*, 235 Ga. 262.) Plaintiff's motion is therefore granted and judgment entered for the plaintiff as herein stated.

It is further ordered that, within a reasonable time from the date of this Order (not more than sixty days), the City Council of Columbus shall provide constitutional zoning for the property which is the subject matter of this litigation, and this Court retains jurisdiction over this matter until such action has been finally accomplished. Upon failure of the Council to so act, this Court reserves jurisdiction to declare the property which is the subject matter of this litigation free and clear of zoning restrictions. (See *Guhl v. Holcomb Bridge Road*, 238 Ga. 323; *Guhl v. Tuggle*, 242 Ga. 412.)

It is further ordered that, in the event of an appeal by defendants, the filing of a notice of appeal shall act as a supersedeas and the reasonable time (not more than sixty days) hereinabove provided for in this Order for the Council to provide constitutional zoning for the subject property shall not begin to run unless and until this judgment is affirmed by the proper appellate court and the judgment of such court is filed in this Court revesting jurisdiction in this Court.

This 26th day of February, 1979.

/s/ OSCAR D. SMITH, JR.
Judge, Superior Court of
Muscogee County

APPENDIX K

IN THE
SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

CROSS COUNTRY CORPORATION, d/b/a Cross Country Plaza Shopping Center,
Plaintiff,

vs. CA No. 70525

JACK P. MICKLE, as Mayor of the City of Columbus, A. J. McCLUNG, as Mayor Protem of the City of Columbus, HENRY N. BARBIAN, JACK B. BASSET, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK E. LAND, ALLAN G. NICAS, LEWIS POWELL, and ROBERT L. WRIGHT, as Councilmen of the City of Columbus, and the CITY COUNCIL OF COLUMBUS, GEORGIA,
Defendants.

REQUEST FOR TRIAL BY JURY

I

Defendants in the above styled action request that the Court grant to them a trial by jury to determine questions of fact that will arise before any final determination can be made in response to the plaintiff's Prayers for Relief.

II

The action is in essence a declaratory judgment action and the law of Georgia provides for either general or special verdicts in such actions.

III

Although the equitable features of the action are only incidental to the declaratory relief sought, the statutory law of Georgia provides for jury trials in equity where matters of fact must be ascertained and such jury verdicts normally are in the form of special verdicts, but the defendants would in the present case suggest that a general verdict is appropriate because of the nature of the legal question.

IV

Defendants suggest that the following questions could be submitted to the jury and that such questions involve matters of fact which the Court needs to have determined before it can mold any final decree, regardless of whether it is considered declaratory or equitable in nature:

(a) Would the proposed rezoning of the subject property have any detrimental effect on the residential use of adjoining property or property directly across the street from the subject property or property within view of the subject property or the adjoining residential neighborhood in general?

(b) Does the present zoning regulation result in at least a little gain or benefit to the public?

(c) Does the present zoning classification of the subject property inflict serious loss or injury on the owner?

(d) Has plaintiff exercised due diligence or been timely in attempting to have the subject property rezoned from its present residential classification to its proposed commercial classification?

(e) Did various residential property owners in the neighborhood purchase or improve their lots or homes in reliance upon the present zoning classification?

(f) Have plaintiff's own actions contributed to any of the problems which are alleged to exist because of the present zoning of the subject property?

V

The Seventh Amendment to the Constitution of the United States provides for a trial by jury in civil cases in suits at common law of which the value in controversy shall exceed $20.00 and Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that no state shall deprive any person of life, liberty, or property without due process of law, nor shall any state enforce any law which shall abridge the

privileges or immunities of citizens of the United States, nor deny any person within its jurisdiction the equal protection of the laws. Irrespective of any provisions of the Constitution of the State of Georgia, the Seventh and Fourteenth Amendments to the Constitution of the United States guaranty to the defendants in the present case the right to a trial by jury and defendants demand the same.

/s/ E. H. POLLEYS, JR.
E. H. Polleys, Jr.
Associate City Attorney
P.O. Box 1340
Columbus, Georgia 31902

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Request for Trial by Jury on Frank Love, Jr. and J. Robert Carr, of the law firm of Powell, Goldstein, Frazer & Murphy, 1100 C & S National Bank Building, Atlanta, Georgia 30303, and on Paul Kilpatrick, Jr., of the law firm of Martin, Kilpatrick & Davidson, P.C., 828 Broadway, Columbus, Georgia 31902, by placing same in the United States mail, postage prepaid.

This 10th day of March, 1978.

/s/ E. H. POLLEYS, JR.
E. H. Polleys, Jr.

Filed: Mar. 10, 1978

APPENDIX L

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

FIFTH AMENDMENT

1-805 (6688) Indictment, punishment, etc.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

1-806 (6689) Trial in criminal cases, and rights of a defendant

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of

the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

SEVENTH AMENDMENT

1-807 (6690) Trial in civil cases

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

FOURTEENTH AMENDMENT

1-815 (6700) Citizenship (Section 1.)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1257

State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

CONSTITUTION OF GEORGIA OF 1976

GA. CODE ANN. §2-103

2-103 (Art. I, Sec. I) Paragraph III. Religious opinions; liberty of conscience

No inhabitant of this State shall be molested in person or property, or prohibited from holding any public office, or trust, on account of his religious opinions; but the right of liberty of conscience shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State.

GA. CODE ANN. 2-301

2-301 (Art. I, Sec. III) Paragraph I. Private ways; just compensation; relocation assistance; land acquisition policies, practices and expenses

1. In case of necessity, private ways may be granted upon just compensation being first paid by the applicant. Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid, except that when private property is taken or damaged for public road and street purposes by the State and the counties and the municipalities of the State, just and adequate compensation therefor need not be paid until the same has been finally fixed and determined as provided by law, but such just and adequate compensation shall then be paid in preference to all other obligations except bonded indebtedness. The General Assembly may by law require the condemnor to make prepayment against adequate compensation as a condition precedent to the exercise of the right of eminent domain and provide for the disbursement of the same to the end that the rights and equities of the property owner, lien holders, and the State and its subdivisions may be protected.

2. Notwithstanding any other provisions of this Constitution, the General Assembly of the State of Georgia may by law require the State and State agencies and institutions, and counties, municipalities, school districts, political subdivisions, public authorities, public agencies, public corporations and public instrumentalities created under this Constitution or the laws of this State: (i) to provide relocation assistance and payments to persons displaced by public projects or programs undertaken or sponsored by the foregoing public entities, including without limitation, all of those relocation assistances and payments as are, by Section 210 of that certain Act of Congress of the United States of America known as the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646, 91st Congress, approved January 2, 1971), required to be made or furnished to such displaced persons by such public entities in order that federal financial assistance can be made available to such public entities with respect to the public projects or programs causing such displacements, and (ii) to establish and implement acquisition policies and practices and provide for the payment or reimbursement of necessary expenses of persons whose properties are acquired in connection with the acquisition of real property for public projects or programs, such policies, practices, payments and reimbursements to include, without limitation, those real property acquisition policies, practices, payments and reimbursements which Section 305 of said Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 requires that the foregoing public

entities establish and implement or pay and reimburse, as the case may be, in acquiring real property for a public project or progam in order that federal financial assistance can be made available to such public entities with respect to such projects or programs. The providing of all of such relocation assistances and payments and, in connection with the acquisition of real property for public projects or programs, the establishing of all of such policies and practices and the paying or reimbursing of all of such necessary expenses, are declared to be necessary, among other reasons, in order to avoid the loss of large sums of money which will otherwise be made available to the foregoing public entities as financial assistance by the United States of America and shall constitute governmental functions undertaken for public purposes, and the powers of taxation may be exercised and public funds expended in furtherance thereof.

RULE 59, GEORGIA SUPREME COURT

24-4559 Rule 59. Affirmance without opinion

Affirmance without opinion may be rendered when the court determines one or more of the following circumstances exists and is dispositive of the appeal:

(1) The evidence supports the judgments;

(2) No error of law appears and an opinion would have no precedential value;

(3) The judgment of the court below adequately explains the decision.

GA. CODE ANN. 110-1101

110-1101 Power of superior courts to declare rights and legal relations; cases in which power can be exercised; effect of other adequate remedy

(a) In cases of actual controversy the respective superior courts of the State of Georgia shall have power upon petition, or other appropriate pleading, to declare rights, and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(b) In addition to the cases specified in paragraph (a) of this section, the respective superior courts of the State of Georgia shall have power upon petition, or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, in any civil case in which it appears to the court that the ends of justuce require that such declaration should be made, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(c) Relief by declaratory judgment shall be available notwithstanding the fact that the complaining party

has any other adequate legal or equitable remedy or remedies.

(Acts 1945, p. 137; 1959, pp. 236, 237.)

GA. CODE ANN. 110-1102

110-1102 Further relief. Damages; injunction; mandamus; quo warranto; service of process; procedure

(a) Further plenary relief, legal or equitable, including but not limited to damages, injunction, mandamus, or quo warranto, may be sought in a petition seeking declaratory judgment, and in such case, said action shall be governed as to process, service and procedure by the provisions of section 110-1104. In all such cases, the court shall award to the petitioning party such relief as the pleadings and evidence may show him to be entitled, and the failure of such petition to state a cause of action for declaratory relief shall not affect the right of such party to any other relief, legal or equitable, to which he may be entitled.

(b) The court, in order to maintain the status pending the adjudication of the questions or to preserve equitable rights, may grant injunction and other interlocutory extraordinary relief, in substantially the manner and under the same rules applicable in equity cases.

(Acts. 1945, p. 137; 1959, pp. 236, 237.)

AN ORDINANCE

No. 30-14

An Ordinance amending that certain Ordinance adopting and enacting Chapter 69-12, Planning Commission of the Code of the State of Georgia, as amended, as the Planning and Zoning Authority for the City of Columbus, Georgia; this amendment changing certain boundaries of districts on the Zoning Atlas of the Planning Division of the Department of Community Development and made a part of the Planning and Zoning Ordinances of Columbus, Georgia; and for other purposes.

WHEREAS, the Cross Country Plaza Shopping Center petitioned for the rezoning of a certain lot at 3000 Birchfield Drive from an R-1A classification to a C-2 classification in 1976; and,

WHEREAS, that petition for rezoning was defeated by the Council of Columbus, Georgia August 17, 1976; and,

WHEREAS, the Cross Country Plaza Shopping Center thereafter brought suit in the Muscogee Superior Court to force the Council of Columbus, Georgia to rezone said property; and,

WHEREAS, the Muscogee Superior Court in an Order dated February 26, 1979 required the Council of Columbus, Georgia to rezone said property from its present R-1A classification to a C-2 classification or some other suitable constitutional classification; and,

WHEREAS, this case No. 70525 in the Muscogee Superior Court was appealed by the Council of Columbus, Georgia to the Supreme Court of Georgia; and,

WHEREAS, the Supreme Court of Georgia affirmed in an Order dated January 8, 1980, the ruling of Muscogee Superior Court, said Supreme Court case being Numbered 35315; and,

WHEREAS, the Supreme Court of Georgia denied the Council of Columbus, Georgia's Motion for Rehearing; and

WHEREAS, there is no other avenue of appeal available in this case; and,

WHEREAS, in its original 1976 petition for rezoning, Cross Country Plaza Shopping Center indicated a willingness to have placed upon the proposed rezoning certain conditions as a requirement for the proposed rezoning; and,

WHEREAS, the Planning Division of Columbus, Georgia, by way of a February 4, 1980 letter addressed to the Mayor and Council, consider these conditions to

be desirable as conditions for any rezoning of the subject property from R-1A to C-2; and,

WHEREAS, the Council of Columbus, Georgia also deems said conditions to be in the general public interest and in the interest of the adjoining neighborhood which is zoned residential

NOW, THEREFORE, THE COUNCIL OF COLUMBUS, GEORGIA HEREBY ORDAINS:

That the Zoning Atlas of the Planning Division of the Department of Community Development be and the same is hereby amended by changing from an R-1A classification to a C-2 classification, the following described property, to-wit:

> BEGINNING at an iron marker on the southern boundary of the right-of-way of Birchfield Drive at its point of intersection with the eastern property line of Lot B, Block "KK" of the 3rd Addition to Hilton Heights Subdivision as shown on a plat of said 3rd Addition to Hilton Heights Subdivision in Plat Book 16, at folio 73-B in the office of the Clerk of the Superior Court, Muscogee County, Georgia, thence running along a line 74 degrees north 35 minutes east 216.4 feet to an iron pin, thence running along a line 74 degrees north 35 minutes east 20.05 feet to an iron pin; thence running along a line south 2 degrees 25 minutes west 229.28 feet to an iron pin; thence running along a

line south 88 degrees 35 minutes west 211.9 feet to a concrete monument; thence running along a line north 2 degrees 13 minutes west 171.66 feet to the point of beginning.

The rezoning of this above described parcel of land from R-1A to C-2 is to be accomplished only upon the following conditions which are made an integral part of this ordinance:

1. The parcel to be used exclusively for parking for a period of at least 20 years.
2. Cross Country Plaza Shopping Center to erect a 55 inch brick wall along Birchfield Drive and along the westerly line of this parcel.
3. Cross Country Plaza Shopping Center to construct a sidewalk along Birchfield Drive.
4. Cross Country Plaza Shopping Center to maintain appropriate landscaping outside the brick wall.

Introduced and read at a regular meeting of the Council of Columbus, Georgia, held on the 11th day of March 1980; read a second time at a regular meeting of said Council held on the 19th day of March 1980, and adopted at said meeting by the affirmative vote of seven members of said Council.

Councilor Basset voting	YES
Councilor Chester voting	YES
Councilor Henry voting	NO
Councilor Jernigan voting	YES
Councilor Kendrick voting	YES
Councilor Land voting	NO
Councilor McClung voting	YES
Councilor Rector voting	YES
Councilor Wells voting	ABSENT
Councilor Wright voting	YES

/s/ LEMUEL H. MILLER, JR.
LEMUEL H. MILLER, JR.
CLERK

/s/ HARRY O. JACKSON
HARRY O. JACKSON
MAYOR

Submitted to the Mayor for signature this the 20 day of March, 1980.

/s/ LEMUEL H. MILLER, JR.
Clerk of Council

Sec: 3-202(1)

This ordinance received, signed by the Mayor at 12:30 o'clock P.M. on the 20th day of March, 1980 and became law at the time received.

/s/ LEMUEL H. MILLER, JR.
Clerk of Council

Sec: 3-202(2)

DEFEATED DEFEATED

AN ORDINANCE

No. 80-24

An Ordinance amending that certain Ordinance adopting and enacting Chapter 69-12, Planning Commission of the Code of the State of Georgia, as amended, as the Planning and Zoning Authority for the City of Columbus, Georgia; this amendment changing certain boundaries of districts on the Zoning Atlas of the Planning Division of the Department of Community Development and made a part of the Planning and Zoning Ordinance of Columbus, Georgia; and for other purposes.

THE COUNCIL OF COLUMBUS, GEORGIA HEREBY ORDAINS:

That the Zoning Atlas of the Planning Division of the Department of Community Development be and the same is hereby amended by changing from an R-1A classification to a A-O classification, the following described property, to-wit:

All that lot tract or parcel of land situate lying and being in Land Lot 95 of the Coweta Reserve of Muscogee County, Georgia and more particularly described as follows:

BEGINNING at a point made by the intersection of the North line of Land Lot 95 with the north line of Birchfield Drive, a public street in Columbus, Muscogee County, Georgia, and from said point running thence south 15 degrees 26 minutes west, a distance of 69.89 feet to an iron pin which iron pin is the point of beginning of the property herein described and which iron pin is also located at what would be the point made by the south line of Birchfield Drive with the westerly line of Wellington Drive which is an undedicated street shown on the plat of the Cross Country Plaza Shopping Center known as Wellington Plaza, Inc., and from said beginning point running thence south 74 degrees 35 minutes west a distance of 216.40 feet to an iron; thence running south 02 degrees 13 minutes east a distance of 171.66 feet to an iron; thence running north 88 degrees 35 minutes east a distance of 211.90 feet to the west line of the said Wellington Drive; thence running north along the west line of Wellington Drive a distance of 229.28 feet to the iron pin which is the point of beginning.

Introduced and read at a regular meeting of the Council of Columbus, Georgia, held on the 11th day of March, 1980; read a second time at a regular meeting of said Council held on the 19th day of March, 1980, and defeated at said meeting by the affirmative vote of nine members of said Council.

Councilor Basset voting	Yes	Yes to defeat after Ord. No. 80-14 was adopted. /s/ LHM
Councilor Chester voting	Yes	
Councilor Henry voting	Yes	
Councilor Jernigan voting	Yes	
Councilor Kendrick voting	Yes	
Councilor Land voting	Yes	
Councilor McClung voting	Yes	
Councilor Rector voting	Yes	
Councilor Wells voting	ABSENT	
Councilor Wright voting	Yes	

DEFEATED
LEMUEL H. MILLER, JR.
CLERK

DEFEATED
HARRY C. JACKSON
MAYOR

Office-Supreme Court, U.S.
FILED
AUG 10 1981
ALEXANDER L. STEVAS,
CLERK

81-21
No. 37047

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JACK P. MICKLE AS MAYOR OF THE CITY OF COLUMBUS, A. J. McCLUNG AS MAYOR PRO TEM OF THE CITY OF COLUMBUS, HENRY N. BARBIAN, JACK B. BASSETT, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK LAND, ALAN G. NICAS, LEWIS POWELL, AND ROBERT L. WRIGHT AS COUNCILMEN OF THE CITY OF COLUMBUS, AND THE CITY COUNCIL OF COLUMBUS, GEORGIA,

Petitioners,

versus

CROSS COUNTRY CORPORATION d/b/a CROSS COUNTRY PLAZA SHOPPING CENTER,

Respondent,

RESPONSIVE BRIEF OF CROSS COUNTRY CORPORATION d/b/a CROSS COUNTRY PLAZA SHOPPING CENTER TO APPLICANTS' PETITION FOR CERTIORARI

FRANK LOVE, JR.
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No. 37047

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October Term, 1981

JACK P. MICKLE AS MAYOR OF THE CITY OF COLUMBUS, A. J. McCLUNG AS MAYOR PRO TEM OF THE CITY OF COLUMBUS, HENRY N. BARBIAN, JACK B. BASSETT, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK LAND, ALAN G. NICAS, LEWIS POWELL, AND ROBERT L. WRIGHT AS COUNCILMEN OF THE CITY OF COLUMBUS, AND THE CITY COUNCIL OF COLUMBUS, GEORGIA,

Petitioners,

versus

CROSS COUNTRY CORPORATION d/b/a CROSS COUNTRY PLAZA SHOPPING CENTER,

Respondent,

Responsive Brief of Cross Country Corporation d/b/a/ Cross Country Plaza Shopping Center to Applicants' Petition For Certiorari

STATEMENT OF THE CASE

Respondent is the owner of a one-acre tract of land located in the city of Columbus, Georgia, adjacent to a developed shopping center also owned by respondent. The one-acre tract is zoned for residential purposes only and this action commenced after the denial of an application for rezoning filed by respondent seeking commercial zoning to permit uses consistent with the adjacent shopping center. Respondent's original action was filed in the Superior Court of Muscogee County, Georgia (Appendix A).

Applicant filed a response to the Complaint and thereafter and on the 10th day of March, 1978 filed a Request For Trial By Jury (Appendix B). After discovery was completed and on the 1st day of December, 1978 applicant filed a Motion For Summary Judgment (Appendix C) contending that "there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law." Thereafter, and on January 5, 1979, respondent filed its Motion For Summary Judgment (Appendix D). After a full hearing the Superior Court of Muscogee County entered an Order granting respondent's Motion For Summary Judgment (Appendix E) and providing in part as follows:

> It is further ordered that, within a reasonable time from the date of this Order (not more than sixty days), the City Council of Columbus shall provide constitutional zoning for the property which is the subject matter of this litigation, and this Court retains jurisdiction over this matter until such action has been finally accomplished. Upon failure of the Council to so act, this Court reserves jurisdiction to declare the property which is the subject matter of this litigation free and clear of zoning restrictions. (See *Guhl v. Holcomb Bridge Road*, 238 Ga. 323; *Guhl v. Tuggle*, 242 Ga. 412.)

Applicant appealed the decision of the trial court to the Supreme Court of Georgia and that Court affirmed the trial court, by decision dated January 8, 1980, without opinion (Appendix F).

After remand to the Superior Court of Muscogee County, the City Council of Columbus (applicants) proceeded to zone the property commercial with numerous

restrictions including a restriction that the property could be used only for parking for a period of twenty years. Respondents promptly filed a Motion in the Superior Court, said Motion being incorporated in Applicants' Petition for Certiorari (pages 28a-34a), and after receiving additional evidence and a hearing, the trial court by Order of April 9, 1980 (Appendix G) remanded the case to the Council with the direction that:

> . . . within 60 days from the date of this Order Council provide constitutional zoning for the subject property and upon failure of which and upon motion by the Plaintiff this Court will declare the subject property free of zoning and enjoin any further attempt on the part of the Council of the City of Columbus from attempting to restrict by zoning the use of the property by its owner.

Applicants again appealed to the Supreme Court of Georgia and on April 8, 1981 the Supreme Court of Georgia again affirmed the decision of the trial court of Muscogee County without opinion (Appendix H).

No Order has ever been entered on applicants' Request For Trial By Jury.

APPLICANTS ARE NOT ENTITLED TO REVIEW BY CERTIORARI

Applicants obtained no ruling from the trial court on their Request For Trial By Jury, presumably because applicants, in a subsequent Motion For Summary Judgment, took the position that there were no genuine issues of fact and the case should be decided as a matter of law. Therefore, the case presents no issue for this Court to determine as to the constitutional right to a jury trial even if applicants' position were correct, which, as a matter of law, it is not.

Applicants' Petition for Certiorari is either (1) an effort to "appeal" from the decision of the Supreme Court of Georgia (such an appeal will not lie), or (2) a contention that summary judgment procedure itself is unconstitutional, an issue which has long since been laid to rest. *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 88 L.Ed. 967, 64 S.Ct. 724 (1944); *Diamond Door Company v. Lane-Stanton Lumber Company*, 505 F.2d 1199 (1974); *Oglesby v. Terminal Transport Company, Inc.*, 543 F.2d 1111 (1976); *Barrett v. Independent Order of Foresters*, 625 F.2d 73 (1980).

CONCLUSION

Applicants' Petition for Certiorari should be denied because of the total absence of a Supreme Court Rule 17(c) showing.

Respectfully submitted,

FRANK LOVE, JR.
Attorney for Respondent

POWELL, GOLDSTEIN, FRAZER & MURPHY
1100 C&S National Bank Building
35 Broad Street, N.W.
Atlanta, Georgia 30335
(404) 572-6600

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Responsive Brief of Cross Country Corporation d/b/a Cross Country Plaza Shopping Center to Applicants' Petition For Certiorari on Mr. E. H. Polleys, Jr., Associate City Attorney, Post Office Box 1340, Columbus, Georgia, 31993, Attorney for Petitioners, by placing said copy in the United States mail, postage prepaid.

This 7th day of August, 1981.

FRANK LOVE, JR.
Attorney for Respondent

APPENDIX A

IN THE

SUPERIOR COURT OF
MUSCOGEE COUNTY

STATE OF GEORGIA

CROSS COUNTRY CORPORATION
d/b/a/ Cross Country Plaza Shopping Center,

Plaintiff,

vs.

JACK P. MICKLE as Mayor of the City of Columbus, A. J. McCLUNG as Mayor Protem of the City of Columbus, HENRY N. BARBIAN, JACK B. BASSET, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK E. LAND, ALAN G. NICAS, LEWIS POWELL, and ROBERT L. WRIGHT as Councilmen of the City of Columbus, and THE CITY COUNCIL OF COLUMBUS, GEORGIA,

Defendants.

CIVIL ACTION
FILE NO. 70525

COMPLAINT

Comes now CROSS COUNTRY CORPORATION d/b/a CROSS COUNTRY PLAZA SHOPPING CENTER (hereinafter referred to as "Cross Country"), and files this its Complaint for Declaratory and Equitable Relief against JACK P. MICKLE, A. J. McCLUNG, HENRY N. BARBIAN, JACK B. BASSET, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK E. LAND, ALAN G. NICAS, LEWIS POWELL and ROBERT L. WRIGHT, as members of the City Council of Columbus, Georgia, (hereinafter collectively referred to as "the Councilmen"), and the City Council of Columbus, (the Councilmen and the City Council of Columbus, Georgia, being hereinafter collectively referred to as "the Council"), respectfully showing the Court the following facts:

1.

The above-named defendants compose the governing authority of Columbus, Georgia, are residents of this County, and are subject to the jurisdiction of this Court.

2.

That plaintiff is the owner of a certain vacant lot at 3000 Birchfield Drive, lying on the south side of Birchfield Drive at its intersection with the Cross Country Plaza Shopping Center, and being more particularly described as follows:

> All that lot or parcel of land lying in Land Lot 95, Coweta Reserve, Columbus, Muscogee County, Georgia and being more particularly described as follows:
>
> Beginning at an iron marker on the southern boundary of the right-of-way of Birchfield Drive at its point of intersection with the eastern property line of Lot B, Block "KK" of the 3rd Addition to Hilton Heights Subdivision as

shown on a plat of said 3rd Addition to Hilton Heights Subdivision in Plat Book 16 at folio 73-B in the office of the Clerk of the Superior Court, Muscogee County, Georgia, thence running along a line 74 degrees north 35 minutes east 216.4 feet to an iron pin, thence running along a line 74 degrees north 35 minutes east 20.05 feet to an iron pin, thence running along a line south 2 degrees 25 minutes west 229.28 feet to an iron pin, thence running along a line south 88 degrees 35 minutes west 211.9 feet to a concrete monument, thence running along a line north 2 degrees 13 minutes west 171.66 feet to the point of beginning.

3.

That on or about June 7, 1976, Cross Country, through its attorneys, made application for rezoning of the above-described real property from its present zoning classification of R-1A (Low Density Residential) to C-2 (Neighborhood Commercial) zoning classification to enhance the utilization of presently undeveloped private lands lying within Columbus, Georgia, by providing needed parking spaces for employees and owners of the shops, stores, businesses, theatres, and offices in the Cross Country Plaza Shopping Center area and for customers of those diverse businesses.

4.

That the Planning Advisory Commission considered this request at their meeting of June 23, 1976, and recommended that the rezoning be approved.

5.

That subsequently, the request for rezoning was submitted to the Planning Division of the

Department of Community Development which, after investigation and careful consideration of said request, recommended to the Council of Columbus, Georgia, that said request be approved and that the Zoning Atlas of the Planning Division of the Department of Community Development be amended as requested.

6.

That the Council of Columbus, Georgia, held a public hearing on Tuesday, August 10, 1976, beginning at 9:00 a.m. in the Council Chambers of the Columbus Consolidated Government Center, for the purpose of hearing interested parties relative to the requested change in the zoning ordinance.

7.

That at its regular weekly meeting held August 17, 1976, the Council arbitrarily, unreasonably, capriciously, and in abuse of its discretion, rejected the requested zoning change. That at its regular meeting, of August 24, 1976, the Council, upon second reading of the proposed zoning change, again arbitrarily, capriciously, and without reason, and in abuse of its descretion, voted to reject the requested zoning change.

8.

That although the property is zoned residential, it has never been used for residential purposes, and in fact, cannot economically and practically be used for the purposes permitted by the existing zoning thereon.

9.

That the zoning ordinance of Columbus, Georgia, which placed the Cross Country property in the R-1A zoning classification is, as applied to the Cross Country

property, arbitrary, unreasonable, and confiscatory, in its application to the Cross Country property, is unconstitutional, null and void, in that it prohibits the use of the Cross Country property for the only use for which the property is reasonably and economically suited, to-wit: commercial use, and has the effect of freezing the Cross Country property in its present undeveloped condition; thus, the application of the present zoning restrictions to the Cross Country property is the equivalent of an unlawful confiscation of the plaintiff's valuable property rights in the Cross Country property without the prior payment of just compensation therefor, since the Cross Country property is unsuitable for the purposes classified, in violation of Art. 1, Sec. 1, Par. 3 of the Georgia Constitution (*Code Ann.* §2-103), Art. 1, Sec. 3, Par. 1 of the Georgia Constitution (*Code Ann.* §2-301), and the due process clause of the Fourteenth Amendment to the Constitution of the United States (*Code Ann.* §1-815) and results in relatively little gain or benefit to the public while inflicting serious injury and loss on the owners of the property.

10.

The rejection of the application for rezoning of the Cross Country property by the Council was arbitrary, unreasonable, and confiscatory in nature in that it deprives the owners of the beneficial use of their property without due process of law and bears no relation to the public health, safety, morals or welfare and amounts to an abuse of the Council's discretion.

WHEREFORE, the plaintiff prays:

(a) that process issue requiring defendants to answer this complaint as provided by law;

(b) that the zoning ordinance of Columbus, Georgia be declared null and void in its application to the Cross Country property;

(c) that the decision to reject the proposed rezoning change by the defendant Council be declared null and void and violative of the constitutional rights of the plaintiff;

(d) that the court adjudge and decree that the only use for the aforedescribed property be commercial use;

(e) that the defendant council be ordered to give immediate consideration to said property and reclassify it under a zoning classification which would not violate the constitutional rights of the property owner and deprive it of its reasonable use as soon as practicable or on a day certain; and

(f) that plaintiff receive such other and further relief as the Court may deem just and proper in the circumstances of this case.

POWELL, GOLDSTEIN, FRAZER & MURPHY

/s/
Frank Love, Jr.

/s/
J. Robert Carr

1100 C&S National Bank Building
Atlanta, Georgia 30303
521-1900

MARTIN, KILPATRICK & DAVIDSON, P.C.

/s/
Paul Kilpatrick, Jr.

828 Broadway
Columbus, Georgia 31902
324-7371

VERIFICATION

STATE OF GEORGIA
COUNTY OF FULTON

Personally before me, the undersigned attesting officer, duly authorized to administer oaths, came LAWRENCE I. THORPE, who after being first duly sworn on oath, states that he is President of Cross Country Corporation, and is authorized by said Company to sign this Verification and that the facts set forth in the attached Complaint are true and correct to the best of his knowledge and belief.

This 12 day of November, 1976.

/s/ Lawrence I. Thorpe

Sworn to and subscribed
before me this 12 day of
November, 1976.

/s/ Anna H. Douglas
Notary Public

My Commission Expires:
October 26, 1980

IN THE
SUPERIOR COURT OF
MUSCOGEE COUNTY
STATE OF GEORGIA

CROSS COUNTRY CORPORATION
d/b/a/ Cross Country Plaza Shopping Center,

Plaintiff,

vs.

JACK P. MICKLE, as Mayor of the City of Columbus, A. J. McCLUNG as Mayor Protem of the City of Columbus, HENRY N. BARBIAN, JACK B. BASSET, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK E. LAND, ALAN G. NICAS, LEWIS POWELL, and ROBERT L. WRIGHT as Councilmen of the City of Columbus, and THE CITY COUNCIL OF COLUMBUS, GEORGIA,

Defendants.

CIVIL ACTION
FILE NO. 70525

REQUEST FOR TRIAL BY JURY

I

Defendants in the above styled action request that the Court grant to them a trial by jury to determine questions of fact that will arise before any final determination can be made in response to the plaintiff's Prayers for Relief.

II

The action is in essence a declaratory judgment action and the law of Georgia provides for either general or special verdicts in such actions.

III

Although the equitable features of the action are only incidental to the declaratory relief sought, the statutory law of Georgia provides for jury trials in equity where matters of fact must be ascertained and such jury verdicts normally are in the form of special verdicts, but the defendants would in the present case suggest that a general verdict is appropriate because of the nature of the legal question.

IV

Defendants suggest that the following questions could be submitted to the jury and that such questions involve matters of fact which the Court needs to have determined before it can mold any final decree, regardless of whether it is considered declaratory or equitable in nature:

(a) Would the proposed rezoning of the subject property have any detrimental effect on the

residential use of adjoining property or property directly across the street from the subject property or property within view of the subject property or the adjoining residential neighborhood in general?

(b) Does the present zoning regulation result in at least a little gain or benefit to the public?

(c) Does the present zoning classification of the subject property inflict serious loss or injury on the owner?

(d) Has plaintiff exercized due diligence or been timely in attempting to have the subject property rezoned from its present residential classification to its proposed commercial classification?

(e) Did various residential property owners in the neighborhood purchase or improve their lots or homes in reliance upon the present zoning classification?

(f) Have plaintiff's own actions contributed to any of the problems which are alleged to exist because of the present zoning of the subject property?

V

The Seventh Amendment to the Constitution of the United States provides for a trial by jury in civil cases in suits at common law of which the value in controversy shall exceed $20.00 and Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that no state shall deprive any person of life, liberty, or property without due process of law, nor shall any state enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny any person within its jurisdiction the equal protection of the laws. Irrespective of any provisions of the Constitution of the State of Georgia, the Seventh and

Fourteenth Amendments to the Constitution of the United States guaranty to the defendants in the present case the right to a trial by jury and defendants demand the same.

/s/
E. H. Polleys, Jr.
Associate City Attorney
P.O. Box 1340
Columbus, Georgia 31902

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Request for Trial by Jury on Frank Love, Jr. and J. Robert Carr, of the law firm of Powell, Goldstein, Frazer & Murphy, 1100 C&S National Bank Building, Atlanta, Georgia 30303, and on Paul Kilpatrick, Jr., of the law firm of Martin, Kilpatrick & Davidson, P.C., 828 Broadway, Columbus, Georgia 31902, by placing same in the United States mail, postage prepaid.

This 10 day of March, 1978.

/s/
E. H. Polleys, Jr.

APPENDIX C

IN THE
SUPERIOR COURT OF
MUSCOGEE COUNTY
STATE OF GEORGIA

CROSS COUNTRY
CORPORATION
d/b/a/ Cross Country Plaza
Shopping Center,

Plaintiff,

vs.

JACK P. MICKLE as Mayor of the City of Columbus, A. J. McCLUNG as Mayor Protem of the City of Columbus, HENRY N. BARBIAN, JACK B. BASSET, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK LAND, ALAN G. NICAS, LEWIS POWELL, and ROBERT L. WRIGHT as Councilmen of the City of Columbus, and THE CITY COUNCIL OF COLUMBUS, GEORGIA,

Defendants.

CIVIL ACTION
FILE NO. 70525

MOTION FOR A SUMMARY JUDGMENT

Defendants move that the Court grant a Summary Judgment in their favor on the grounds that the pleadings and depositions and answers to interrogatories on file show that there is no genuine issue as to any material fact and that Defendants are entitled to a judgment as a matter of law. The Court is requested to grant a Certificate of Immediate Review in the event that the motion is denied.

/s/

E. H. POLLEYS, JR.
Associate City Attorney
P.O. Box 1340
Columbus, Georgia 31902

NOTICE OF MOTION

To: Frank Love, Jr., 1100 C&S National Bank Building, Atlanta, Georgia, 30303 and Paul Kilpatrick, Jr., 828 Broadway, Columbus, Georgia, 31902; Attorneys for Plaintiff

Please take notice that the Defendants will bring this Motion for a Summary Judgment on for a hearing before the Honorable Oscar D. Smith, Jr., at 11:00 o'clock a.m. on the 5th day of January, 1979.

/s/

E. H. Polleys, Jr.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing motion on opposing counsel by placing a copy in the United States mail, postage prepaid.

This 1 day of December, 1978.

/s/

E. H. Polleys, Jr.

IN THE
SUPERIOR COURT OF
MUSCOGEE COUNTY
STATE OF GEORGIA

CROSS COUNTRY CORPORATION d/b/a/ Cross Country Plaza Shopping Center, *Plaintiff,* vs. JACK P. MICKLE as Mayor of the City of Columbus, A. J. McCLUNG as Mayor Protem of the City of Columbus, HENRY N. BARBIAN, JACK B. BASSET, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK LAND, ALAN G. NICAS, LEWIS POWELL, and ROBERT L. WRIGHT as Councilmen of the City of Columbus, and THE CITY COUNCIL OF COLUMBUS, GEORGIA, *Defendants.*	CIVIL ACTION FILE NO. 70525

MOTION FOR SUMMARY JUDGMENT

Now comes plaintiff, CROSS COUNTRY CORPORATION, and moves the Court pursuant to Section 56B of the Georgia Civil Practice Act for summary judgment in favor of plaintiff on claims presented in plaintiff's complaint on the grounds that there is no genuine issue as to any material facts and plaintiff is entitled to judgment as a matter of law. This motion is based upon

(1) plaintiff's complaint and the answer thereto;

(2) the depositions on file in this case;

(3) the Affidavit of Lawrence I. Thorpe;

(4) the Affidavit of James Pierce; and

(5) any and all other pleadings and documents which are a part of the record in this case which may be deemed relevant by the Court.

This 5th day of January, 1979.

/s/
Frank Love, Jr.

POWELL, GOLDSTEIN, FRAZER & MURPHY
1100 C&S National Bank Building
Atlanta, Georgia 30303
(404) 572-6600

/s/
Paul Kilpatrick, Jr.

MARTIN, KILPATRICK & DAVIDSON, P.C.
P.O. Box 2828
Columbus, Georgia 31902
(404) 324-7371

Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 5th day of January, 1979

/s/
Paul Kilpatrick, Jr.

APPENDIX E

IN THE
SUPERIOR COURT OF
MUSCOGEE COUNTY
STATE OF GEORGIA

CROSS COUNTRY CORPORATION
d/b/a/ Cross Country Plaza Shopping Center,

Plaintiff,

vs.

JACK P. MICKLE as Mayor of the City of Columbus, A. J. McCLUNG as Mayor Protem of the City of Columbus, HENRY N. BARBIAN, JACK B. BASSET, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK LAND, ALAN G. NICAS, LEWIS POWELL, and ROBERT L. WRIGHT as Councilmen of the City of Columbus, and THE CITY COUNCIL OF COLUMBUS, GEORGIA,

Defendants.

CIVIL ACTION
FILE NO. 70525

ORDER

Plaintiff and defendant having each filed their separate motions for summary judgment and the above case having come on regularly before the undersigned for presentation of evidence and agrument on February 5, 1979, and the Court having considered the relevant portions of all affidavits submitted by both plaintiff and defendants, the various documents introduced, relevant portions of the depositions on file, the verified complaint and relevant portions of answers to interrogatories, and after extensive argument and citation of authority by counsel for plaintiff and defendants, the Court finds as follows:

Plaintiff was substantially damaged by the refusal of the City Council of Columbus to rezone plaintiff's property from R-1A to C-2 in accordance with plaintiff's application for rezoning. Plaintiff was not only effectively deprived of the use of their property, but have likewise suffered substantial monetary damage because of the unsuitability of the subject property for residential development and the substantial difference in value of the property zoned as R-1A and the property zoned C-2. The Court also finds that the zoning classification maintained and enforced by the City Council of Columbus bore no substantial relation to the public health, safety, morality or general welfare of the community. Lacking such justification, the Court finds and declares that the action of the City Council of Columbus was arbitrary and unreasonable and in violation of Article 1, Sec. 1, Par. 3 of the Georgia Constitution (Code Ann. §2-103), Article 1, Sec. 3, Par. 1 of the Georgia Constitution (Code Ann. §2-301), and the due process clause of the Fourteenth Amendment to the Constitution of the United States (Code Ann. §1-815). (See *Barrett v. Hamby*, 235 Ga. 262.) Plaintiff's motion is therefore granted and judgment entered for the plaintiff as herein stated.

It is further ordered that, within a reasonable time from the date of this Order (not more than sixty days), the City Council of Columbus shall provide constitutional zoning for the property which is the subject matter of this litigation, and this Court retains jurisdiction over this matter until such action has been finally accomplished. Upon failure of the Council to so act, this Court reserves jurisdiction to declare the property which is the subject matter of this litigation free and clear of zoning restrictions. (See *Guhl v. Holcomb Bridge Road*, 238 Ga. 323; *Guhl v. Tuggle*, 242 Ga. 412.)

It is further order that, in the event of an appeal by defendants, the filing of a notice of appeal shall act as a supersedeas and the reasonable time (not more than sixty days) hereinabove provided for in this Order for the Council to provide constitutional zoning for the subject property shall not begin to run unless and until this judegment is affirmed by the proper appellate court and the judgment of such court is filed in this Court revesting jurisdiction in this Court.

This 12th day of February, 1979.

/s/ Oscar D. Smith, Jr.

Judge, Superior Court of Muscogee County

In the Supreme Court of Georgia.

Decided: January 8, 1980

35315. MICKLE, MAYOR et al. v. CROSS COUNTRY CORPORATION

Judgment affirmed without opinion pursuant to Rule 59.

All the Justices concur.

APPENDIX G

IN THE
SUPERIOR COURT OF
MUSCOGEE COUNTY
STATE OF GEORGIA

CROSS COUNTRY CORPORATION d/b/a/ Cross Country Plaza Shopping Center, *Plaintiff,* vs. JACK P. MICKLE, et al., *Defendent.*	CIVIL ACTION FILE NO. 79525 **MOTION**

ORDER

Plaintiff having moved the Court to declare the property which is the subject matter of this litigation free of zoning or, in the alternative, to remand the case to the Council of the City of Columbus, with the direction that they grant constitutional zoning and said Motion having come on regularly for hearing and the Court having considered evidence submitted on behalf of the Plaintiff and Defendant's argument of counsel and citation of authority, finds as follows:

The action of the City Council by Ordinance of March 19, 1980 purporting to rezone the subject property C-2 but attaching the following restrictions and conditions:

1. The parcel to be used exclusively for parking for a period of at least 20 years.

2. Cross Country Plaza Shopping Center to erect a 55 inch brick wall along Birchfield Drive and along the westerly line of this parcel.

3. Cross Country Plaza Shopping Center to construct a sidewalk along Birchfield Drive.

4. Cross Country Plaza Shopping Center to maintain appropriate landscaping outside the brick wall.

was arbitrary, capricious, discriminatory, unreasonable and without regard or consideration of the interests of the owner of the property and bears no relation to a concern for the health, welfare and safety of the community. This Court, following the directive of the Supreme Court of Georgia in the case of *DeKalb Co. v. Flynn*, 243 *Ga.* 679, remands the matter to the Council of the City of Columbus with the direction that, within 60 days from the date of this Order Council provide constitutional zoning for the subject property and upon failure of which and upon motion by the Plaintiff this Court will declare the subject property free of zoning and enjoin any further attempt on the part of the Council of the City of Columbus from attempting to restrict by zoning the use of the property by its owner.

SO ORDERED this 9th day of April, 1980.

/s/ Oscar D. Smith, Jr.
Judge, Superior Court of Muscogee County

APPENDIX H

In the Supreme Court of Georgia

Decided: April 8, 1981

37047. MICKLE et al. v. CROSS COUNTRY CORPORATION d/b/a CROSS COUNTRY PLAZA SHOPPING CENTER.

MARSHALL, Justice.

Judgment affirmed without opinion pursuant to Rule 59.

All the Justices concur, except Jordan, C. J., who dissents.